No. _____

2007

In The

Supreme Court of the United States

SCOTT J. LEVINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sentence imposed by the trial court was unreasonable when the loss based solely on the jury's guilty verdicts was $20,230 but, after denying Mr. Levine's motion for a special verdict form to permit the jury to determine the amount of the loss, the court sentenced Mr. Levine in accordance with a base offense level for a loss of $850,000, the increase in loss relating exclusively to counts for which there was insufficient evidence and the jury found Mr. Levine not guilty?

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OPINION BELOW

The published opinion of the United States Court of Appeals, Eighth Circuit, is contained in the Appendix (hereinafter "App.") at pages 1-14.

JURISDICTION

The judgment to be reviewed was entered on February 21, 2007. Jurisdiction is conferred on this Court by Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition are as follows:

1. The right to trial by jury afforded by the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Title 18, U.S.C. Section 1030(a)(2)(C) and (c)(2)(B)(i) and (iii)

Whoever – * * * intentionally accesses a computer without authorization or exceeds authorized access, and

thereby obtains – * * * information from any protected computer if the conduct involved an interstate or foreign communication * * * shall be punished as provided in subsection (c) of this section.

The punishment for an offense under subsection (a) or (b) of this section is – * * * a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), * * * if, the offense was committed for the purpose of commercial advantage or private financial gain; * * * or the value of the information obtained exceeds $5,000; * * *

3. Title 18, U.S.C. Section 1029(a)(3)

(a) Whoever – * * * (3) knowingly and with the intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices; * * * shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

(c) Penalties – (1) Generally – The punishment for an offense under subsection (a) of this section is – (A) in the case of an offense that does not occur after a conviction for another offense under this section – (I) if the offense is under paragraph (1), (2), (3), (6), (7) or (10) of subsection (a), a fine under this title or imprisonment for not more than 10 years, or both; * * *

4. Title 18, U.S.C. Section 1512 (c)(1)

(c) Whoever – (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; * * * shall be fined under this title or imprisoned not more than 20 years, or both.

5. Federal Sentencing Guidelines Manual (2003 edition) Section 2 B 1.1.

(a) Base Offense Level:

* * *

(2) 6, otherwise.

(b) Specific offense characteristics

(1) If the loss exceeded $5,000 increase the offense level as follows:

* * *

(C) More than $10,000 add 4

* * *

(H) More than $400,000 add 14

STATEMENT OF THE CASE

From January 7, 2000 through August 21, 2003 Scott Levine was the CEO of Snipermail, Inc. ("Snipermail"). The company was owned by the Levine Family Partnership. Snipermail was located in Boca Raton, Florida. The company was in the business of selling e-mail lists.

During 2003 Snipermail did business with a company called Acxiom Corporation ("Acxiom"). Acxiom maintains its principal offices in Little Rock, Arkansas and offers many services to its diverse client base. One of the services Acxiom offers is the warehousing of e-mail and postal mailing lists received from list brokers who have responded to a request for proposal ("RFP") for a marketing campaign of a customer. This service is a small part of Acxiom's business and is primarily conducted on its

outside computer located at a facility in Conway, Arkansas. Acxiom filters the data received to ensure that the client does not purchase addresses that it already has. This process is called merge-purge. In addition, Acxiom can add additional demographics to a list for an additional charge.

In July 2003, Acxiom received a telephone call from Detective Sweeney in Hamilton, Ohio. He advised Acxiom that he had arrested Daniel Baas who was found in possession of over 34 compact discs upon which Mr. Baas had downloaded 11,162 files from the Conway computer of Acxiom. The files contained customer lists of third parties. Mr. Baas pled guilty to violating 18 U.S.C. Section 1030. The United States reported to the court during Mr. Baas' sentencing that the value of the 11,162 data files was approximately $1,900,000 ($170 per file). As a result, Mr. Baas was sentenced to 46 months of incarceration.

Following this telephone call Acxiom reviewed the logs on its outside computer and discovered that through inadvertence it had left the passwords needed to open all of the files on the computer in the computer's Windows directory. This permitted any customer that gained access to the outside computer in Conway, Arkansas using their assigned password to also access the files of other customers. These files predominantly contained customer lists as well as e-mail and postal addresses for marketing campaigns.

In the beginning of August 2003, Acxiom determined that the internet protocol (IP) address of Snipermail had an unusually high volume of bytes of data sent to it from the Acxiom outside computer. Acxiom promptly wrote a computer program to assign new passwords to all of the customers who had data files on the outside computer.

Acxiom also removed the password list from the outside directory. Ultimately, Acxiom determined that 4,789 data files had been copied and transferred to the Snipermail IP address. The files were the same files that Mr. Baas had downloaded however, Mr. Baas had downloaded thousands of additional files.

On or about August 11, 2003, agents from the FBI and Secret Service visited the offices of Snipermail to inquire about the contents of its computers. The agents requested permission to copy the data on the company's main server. Mr. Levine agreed. The agents attempted to copy the data for several days but, due to the large volume of data they determined that they were not successful in making the mirror image that they desired. On August 17, 2003 the agents returned to Snipermail with a search warrant authorizing them to remove all of the records of Snipermail.

On August 21, 2003, Mr. Levine received a telephone call from Agent Chadwick Shephard. Agent Shephard asked Mr. Levine to bring his personal laptop computer to the Snipermail offices so the agents could make a copy of the contents of the hard drive. Mr. Levine's hard drive had been replaced in July 2003. This occurred prior to the investigation of Snipermail as a result of a computer malfunction and at a time when the computer was not in the custody and control of Mr. Levine. Nonetheless, Mr. Levine delivered the laptop to agent Shephard.

Mr. Levine was charged by indictment on July 21, 2004. The indictment contained 144 counts. Count one alleged that Mr. Levine conspired to violate 18 U.S.C. Sections 1030, 1957, 1029 and 1512. Counts 2 through 140 of the indictment alleged that Mr. Levine improperly

accessed and transferred specific computer files at certain times on certain dates. Count 141 alleged money laundering. Counts 142 and 143 charged Mr. Levine with being in possession of 15 or more computer access devices. Finally, Count 144 charged Mr. Levine with obstruction of justice for allegedly hiding or destroying computers and computer hard drives.

The jury trial began on July 12, 2005. The evidence introduced by the Government was circumstantial in nature. The United States called witnesses from Acxiom who testified that its computer log showed that 4,789 files were copied and electronically sent to Snipermail's internet protocol address. No damage occurred to Acxiom's computers or its data. The case agents testified that they found remnants of many files on Snipermail's central computer. This computer was accessed regularly by employees and consultants on site and at remote locations. Several of the employees of Snipermail testified that Mr. Levine often worked on the company computers transferring data. Snipermail's business required it to continuously transfer data to and from customers. No witness identified any file from Acxiom as being a file downloaded by Mr. Levine. No files were found on Mr. Levine's laptop computer. However, the Government alleged that Mr. Levine had erased or otherwise disposed of the evidence.

Mr. Levine moved for judgment of acquittal pursuant to Rule 29 at the conclusion of the Government's case in chief. The motion was denied. Mr. Levine then presented his case in chief. On August 9, 2005 the Court held a jury instruction charge conference. Mr. Levine requested a special verdict form that would permit the jury to determine the loss for each count. The court initially took the matter under advisement but ultimately denied the motion. After

calling his final witness, Mr. Levine rested. At that time, Mr. Levine renewed his motion pursuant to Rule 29. The motion was denied.

The Government recalled one witness and rested. Mr. Levine once again renewed his Rule 29 motions. The Court denied the motions. The Court then instructed the jury. Closing arguments took place the following day. The jury began its deliberations on August 11, 2005. On August 12, 2005 the jury returned its verdict. Mr. Levine was found not guilty on Count 1 (the overall conspiracy count for all 4,789 alleged downloads) as well as Counts 2 through 5 and 11 through 19 (alleging downloads of specific files). Mr. Levine was also found not guilty of money laundering as set forth in Count 141. The government dismissed Counts 6 through 10 and Count 55.

Mr. Levine was found guilty of downloading the files set forth in Counts 20 through 54 and 56 through 140. Each count related to a specific file that was copied and transformed on a certain date and time. In addition, Mr. Levine was found guilty of possessing 15 or more computer access devices as alleged in Counts 142 and 143 as well as obstruction of justice as set forth in Count 144. Mr. Levine timely filed a written motion for judgment of acquittal and/or new trial on August 19, 2005. The motion was denied.

On March 10, 2006 the Court sentenced Mr. Levine. The Court found that all of the counts arose from the same facts and should be grouped together for sentencing. Mr. Levine argued that the base offense level should be determined using a loss of $20,230. This amount was calculated by multiplying $170 per file times the 119 files serving the basis for the specific counts the jury had found Mr. Levine

guilty of copying. The Court rejected this argument and found that the loss for sentencing purposes was approximately $850,000. This amount was determined by multiplying 4,789 files times $170 per file.

This calculation resulted in a base offense level of 20 instead of a level 10. The offense level was adjusted upward 4 levels when the Court found that Mr. Levine was an organizer of a scheme that had 5 or more participants. The Court also adjusted the offense level upward by 2 levels because Mr. Levine had obstructed the investigation. This resulted in an adjusted offense level of 26, instead of a level 16. The guideline range for level 26 is 63 to 78 months for a defendant with a criminal history category of 1. The instant offense was Mr. Levine's first arrest and first conviction. He had zero criminal history points and he qualified for category 1. The Court sentenced Mr. Levine to 60 months on Counts 20-54, and 55-140. However, the Court departed from the federal sentencing guidelines and sentenced Mr. Levine to 96 months on Counts 142-144. All counts were ordered to run concurrently.

The Court stated during the sentencing hearing that it was departing upward because of Mr. Levine's involvement with Friendly Power (wherein a federal judge had found, in a civil case brought by the SEC seeking a permanent injunction, that Mr. Levine was part of a scheme to violate securities laws which prohibited the sale of unregistered securities) and because there was a substantial risk of non-monetary harm in this case. Mr. Levine objected to the Court's determination of the offense level, the "organizer" upward adjustment of 4 levels, and the upward departure.

Mr. Levine moved for reconsideration and/or correction of sentencing. Mr. Levine argued that the Court improperly departed above the federal sentencing guidelines. The Court denied the motion. Mr. Levine is currently serving his sentence at the Federal Correctional Institution located in Miami, Florida.

REASON FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT COURT OF APPEALS, BY APPROVING THE SENTENCE OF 96 MONTHS ENTERED BY THE TRIAL COURT AGAINST MR. LEVINE, HAS RENDERED AN OPINION THAT CONFLICTS WITH THE GUARANTEE OF THE SIXTH AMENDMENT TO A TRIAL BY JURY AS WELL AS RELEVANT DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS ON THIS ISSUE.

ARGUMENT

Mr. Levine hereby presents the following argument in support of his position that the sentence he received was unreasonable.

The Court Violated Mr. Levine's Sixth Amendment Rights By Sentencing Him Based Upon a Loss of $850,000 After Denying His Motion for a Special Verdict to Permit the Jury to Determine the Loss, When the Loss Based Solely on the Jury's Guilty Verdicts was $20,230 and the Increase Related Exclusively to Counts for Which There was Insufficient Evidence and the Jury Found Mr. Levine Not Guilty.

The grand jury approved an indictment that charged in Count 1 Mr. Levine with conspiring to access, copy and transfer 4,789 specific files from the Acxiom computer. The jury found Mr. Levine not guilty of this Count. Counts 2 through 140 alleged 139 specific files of data that were allegedly accessed, copied, and transferred. The jury found Mr. Levine guilty of accessing, copying and transferring the 119 specific files which served as the basis for Counts 20 through 54 and 56 through 140.

During the trial the Government presented evidence that the Acxiom computer log reflected a total of 4,789 individual files had been accessed and transferred from the Acxiom computer to the Snipermail IP address in support of the charge of conspiracy as set forth in Count 1 of the indictment. Snipermail's router did not maintain a log of incoming and outgoing transfers. As a result, there was no confirmation whether all 4,789 files landed at Snipermail or if Snipermail was the first stop for the file. The evidence showed that several employees and consultants were capable of causing the transfer of the files from a remote location using Snipermail's router to conceal the IP address of the final destination of the files.

Mr. Levine requested a special verdict form that would permit the jury to determine the loss for each count. Mr. Levine cited *United States v. Kosinski*, 127 Fed. Appx. 742 (6th Cir. 2005) and *United States v. Leach*, 417 F.3d 1099 (10th Cir. 2005) in support for his motion for a special verdict form. The Court initially took the matter under advisement but, ultimately denied the motion.

Acxiom discovered that the subject 4,789 files were copied and transferred as a result of the investigation it conducted when it had been notified by the Hamilton

County Sheriff's Office that Daniel Baas was found in possession of 11,162 files from the same Acxiom external computer. Daniel Baas pled guilty and the United States represented to the Court that Acxiom placed a value of $1,900,000 on the 11,162 files. This was an average of approximately $170 per file. During the preliminary injunction and forfeiture hearing the Court considered the arguments of all parties and the evidence introduced at trial and found in its ruling: "That the data files have no intrinsic value."

At sentencing the Government argued that Mr. Levine should be sentenced based upon the value of all 4,789 files. Mr. Levine argued that he was found not guilty as to Count one which related to the 4,789 files. Since, Mr. Levine was found guilty of accessing and transferring only 119 files the loss should have been (119 x $170) approximately $20,230.

At sentencing the Court stated the following:

> THE COURT: I'll just be honest with you, based on all the evidence, I'm satisfied that the government's position over eggs the pudding. I think that the defense's position is too conservative. But my problem is, how am I going to slice the melon? How am I going to come up with a figure, since I don't agree with your figure? I think there was some extra done there, without question there was going the extra mile because they were working on the project. And so I need some help on how I'm going to give you the total figure.
>
> * * *
>
> THE COURT: In Baas, the forfeiture – I mean, the value was calculated at 800 plus, wasn't it?

MR. GARVIN: The value of the data was reported to the court at 1.9 million dollars. Now, that was for 11,000 –

* * *

THE COURT: Where does the 800,000-dollar figure come from? I've got that in my mind. I read that in the Baas case.

MR. GARVIN: I can tell you where it may have come from, Your Honor.

THE COURT: Let me look at my notes here. $853,651. Now, I didn't just dream that.

MR. GARVIN: I believe that is if you divide 11,000 –

THE COURT: Oh, that was your calculation.

MR. GARVIN: Yes, sir. When you divide 11,163 files into 1.9 million, which was the value of the data – and we're talking about the value of the data now. The value of the data came out to $170 a file. In Mr. Levine's case, we're talking about 119 files, which was the conviction files, at $170 a file, and if you do the math on that, it comes out to around $30,000. If you went ahead and took the extra step and found Mr. Levine responsible for the full 4,789 files at $179 a file, it came to the figure that this Honorable Court just mentioned.

THE COURT: I realize you disagree with that figure, but I know now where I saw it. It wasn't in the case. It was in your papers.

* * *

And so, like I said, it's very hard to come up with a figure, but I feel very comfortable with the figure of $850,000. And that's based on all of the

> testimony. And I'm relying to some extent on the Baas case and the calculation by defense on the number of files as set forth on page 9 of the defendant's objections of Scott Levine to the presentence investigative report. This was the one served on the 26th day of January, 2006. So I'm going to find the loss at $850,000.
>
> The I believe, with all the other rulings I've made it, it gives us a range of 63 to 78 months.

The court in essence ruled that all 4,789 files would qualify as relevant conduct and multiplied the average value of $170 per file to arrive at a loss of approximately $850,000. In doing so the Court punished Mr. Levine as if he had been found guilty by the jury as to Count 1 of the indictment. However, the evidence relating to the 4,789 files had been introduced by the Government during the trial to prove the alleged conspiracy and the jury rejected this claim and found the Defendant not guilty. As a result, Mr. Levine was punished for acquitted conduct.

If the indictment had only been one count, there is no doubt that punishing Mr. Levine for evidence presented that was rejected by the jury and resulted in a not guilty verdict would be unconstitutional. It is equally clear that the Court has punished Mr. Levine on the evidence relating exclusively to Count 1 in this case despite the fact that the jury found Mr. Levine not guilty on this count. As a result, the sentence Mr. Levine received is not only unreasonable, it is unconstitutional. Mr. Levine should not have had his sentence guideline increased for alleged losses from downloads he was found not guilty of causing.

In the landmark case of *Apprendi v. New Jersey*, 503 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000) this Court held that, under the Sixth Amendment, any fact

(other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt. This Court applied its ruling in *Apprendi* to the facts presented in the case of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004), and found that the sentence given to Mr. Blakely pursuant to the Washington Reform Act was unconstitutional. The maximum penalty for Blakely's offense was ten years, but if no facts beyond those reflected in the jury's verdict were found by the trial judge, Blakely could not receive a sentence above a standard range of 49 to 53 months. Blakely was sentenced to 90 months based upon the judge's findings of deliberate cruelty. This was held unconstitutional. It did not matter that Blakely's sentence, though outside the standard range, was within the ten year maximum.

In *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), Mr. Booker was sentenced under the Federal Sentencing Guidelines. The facts found by the jury yielded a base guideline range of 210 to 262 month's imprisonment, a range the judge could not exceed without undertaking additional fact finding. The judge made additional findings of fact that boosted Booker into a higher guideline range. This Court held that Booker's sentence was impermissible largely for the same reasons Blakely's sentence was found unconstitutional. There was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [Blakely]." Both were mandatory and imposed binding requirements on all sentencing judges. The Court determined that if the guidelines were advisory they would not implicate the Sixth Amendment. After *Booker*, courts are to "take account" of the range along with sentencing goals enumerated in the Sentencing

Reform Act. The Court in *Booker* thereby installed a "reasonableness" standard of review for sentences.

The reasonableness of a sentence is largely determined by the recommended sentencing range of the Federal Sentencing Guidelines. The Federal Sentencing Guidelines set forth a level for the base offense. This level is controlled by the amount of the loss caused by the offense. The Federal Sentencing Guidelines Manual (2003 edition) Section 2 B 1.1. provides:

(a) Base Offense Level:

* * *

(2) 6, otherwise.

(b) Specific offense characteristics

(1) If the loss exceeded $5,000 increase the offense level as follows:

* * *

(C) More than $10,000 add 4

* * *

(H) More than $400,000 add 14.

Once the base offense level is determined, the guideline level is adjusted for the defendant's role in the offense. In this particular case, Mr. Levine's offense level was increased by 4 levels because the Court found that he was a leader and 5 of his employees were involved in the improper conduct. The court increased the offense level by 2 additional levels for obstruction. Ultimately, Mr. Levine's final adjusted sentencing level was determined to be a level 26, instead of a level 16 supported by the jury's verdicts.

Once the adjusted offense level has been determined the Federal Sentencing Guidelines present a sentence range for a person with a certain criminal history. In this case, Mr. Levine had no prior arrests or convictions and had no criminal history.

Before rendering a sentence the Court shall also consider other factors in fashioning an appropriate sentence as set forth in 18 U.S.C. Section 3553(a). The final sentence must be reasonable under all of the circumstances. However, the courts have inferred that a sentence within the suggested range provided by the Federal Sentencing Guidelines is presumed reasonable. *United States v. Rita*, 177 Fed. Appx. 357 (4th Cir. 2006), cert. granted, 127 S.Ct. 551, 166 L. Ed. 2d 406 (2006) and *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), cert. granted, 127 S.Ct. 551, 166 L. Ed. 2d 406 (2006).

As stated above, in the instant case Mr. Levine was convicted of accessing, copying and transferring 119 files. He was also found guilty of two counts of having 15 or more computer passwords on his computer. These passwords were determined to be improper computer access devices (Counts 142 and 143). Finally, he was found guilty of one count of obstruction for allegedly concealing or destroying certain computer hard drives. The loss associated with these counts was $20,230. However, the Court determined Mr. Levine's base offense level on counts for which Mr. Levine was found not guilty. This resulted in an adjusted Federal Sentencing Guideline level and recommended sentencing range of 63 to 78 months. This process was in violation to Mr. Levine's Sixth Amendment rights. No presumption of reasonableness can be properly associated with this guideline range. Further, adjustments made to

this sentencing range by the court after considering the factors set forth in 18 U.S.C. Section 3553(a) do not result in a reasonable sentence because the very foundation or base of the sentence was unreasonable and unconstitutionally determined. While the Federal Sentencing Guidelines are no longer mandatory the sentencing court is still required to consider the sentence range recommended by the Federal Sentencing Guidelines.

In support of his position that the court rendered an unreasonable sentence when it denied his motion for a special verdict to permit the jury to determine the loss and sentenced him based upon a loss amount derived primarily from conduct for which he was acquitted, Mr. Levine cites *United States v. Thornton*, 188 Fed. Appx. 733 (10th Cir. 2006), cert. denied, 127 S.Ct. 843, 166 L. Ed. 2d 675 (2006); *United States v. Coleman*, 370 F. Supp. 2d 661 (S.D. Ohio 2005); *United States v. Kandiras*, 441 F. Supp. 2d 282 (D. Mass. 2006); *United States v. Gray*, 362 F. Supp. 2d 714 (S.D. W.Va. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005); *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001). See also, *United States v. Kosinski*, 127 Fed. Appx. 742 (6th Cir. 2005) and *United States v. Leach*, 417 F.3d 1099 (10th Cir. 2005).

In *United States v. Wendelsdorf*, 423 F. Supp. 2d 927 (N.D. Iowa 2006), the jury found the defendant not guilty of the charge of conspiracy to manufacture and distribute methamphetamine but convicted the defendant on the charge of manufacturing. The government sought to introduce evidence at sentencing relating to the acquitted conduct. The Court ruled that the evidence was inadmissible and held that the evidence was insufficient to meet either the beyond a reasonable doubt standard or the preponderance of the evidence standard. Compare, *United States v.*

Vigil, 476 F. Supp. 2d 1231 (D. N. M. 2007), wherein the court found that the fact that the defendant was acquitted on all but one count was a factor to warrant a downward variance from the guideline range. See also, *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L. Ed. 2d 524 (2002) wherein the mandatory minimum was increased based upon the defendant brandishing a weapon.

In the instant case, there was insufficient evidence under either standard to establish that Mr. Levine was responsible for accessing, copying or transferring the 4,789 files that Acxiom's computer log reflected as being sent to Snipermail's internet protocol address. Excluding the 119 files for which Mr. Levine was convicted, Mr. Levine was not found to be in possession of any other files or fragments of files. Not one witness testified that they had personal knowledge that Mr. Levine downloaded these 4,670 files or that anyone else downloaded the subject files at Mr. Levine's request. The identity of the person or persons who downloaded the 4670 files for which Mr. Levine was not convicted remains a complete mystery. There is nothing in the record that would support a finding that Mr. Levine or any other person for that matter, more likely than not was the person who caused this to happen. As a result, not only was Mr. Levine's sentence based substantially on acquitted conduct, it was based upon conduct that could not objectively meet the preponderance of the evidence standard and is therefore unreasonable. See, *United States v. Zuni*, 2007 U.S. Dist. Lexis 34557 (D. N. M. 2007).

Mr. Levine is mindful that there are a number of cases which support the proposition that the Court may increase a sentence for conduct supported by the preponderance of the evidence. See, *United States v. Jones*, 54 F.3d 1285

(7th Cir. 1995); *United States v. Bras*, 2007 U.S. App. Lexis 9120 (D.C. Cir. 2007); *United States v. Pineiro*, 470 F.3d 200 (5th Cir. 2006); *United States v. Harper*, 448 F.3d 732 (5th Cir. 2006); *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 132 L. Ed. 2d 351 (1995); and *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L. Ed. 2d 554 (1997) sentencing court could consider conduct of defendant's underlying charge of which defendant is acquitted, if the government establishes the specific conduct by a preponderance of the evidence. However, while Mr. Levine does not agree that these cases are consistent with the requirements of the Sixth Amendment, they are not dispositive of the issue presented in the instant case because there was no specific finding that the evidence as to the remaining 4,670 files established by a preponderance of the evidence that Mr. Levine had caused the same to be copied and transferred. There was insufficient evidence to establish by a preponderance of the evidence who had copied and transferred each of the subject files.

CONCLUSION

The Eighth Circuit Court of Appeals approved a sentence that was unconstitutionally unreasonable when it approved Mr. Levine's sentence of 96 months based upon a loss associated with acquitted conduct for which there was insufficient evidence to establish by even a preponderance of the evidence that Mr. Levine had committed. Mr. Levine's sentence should be vacated and remanded with directions that Mr. Levine be sentenced on the loss associated with 119 counts upon which he was found guilty (i.e. $20,230).

For these reasons, Petitioner respectfully prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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477 F.3d 596

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-1628

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
	*	Arkansas.
Scott J. Levine,	*	
Appellant.	*	

Submitted: December 12, 2006
Filed: February 21, 2007

Before WOLLMAN, BEAM, and RILEY, Circuit Judges.

BEAM, Circuit Judge.

Scott J. Levine was charged in a 144-count indictment, alleging conspiracy to access a protected computer without authority, unauthorized access of a protected computer, money laundering, possession of unauthorized access devices, and attempted obstruction of justice. A jury found Levine guilty of counts 20-54 and 56-140 (aiding and abetting the unauthorized access of protected computers), counts 142 and 143 (aiding and abetting the possession of unauthorized access devices), and count 144 (aiding and abetting obstruction of justice). Levine was acquitted of all

other counts, except for six counts, which the government dismissed. The district court[1] denied his motion for judgment of acquittal or in the alternative for new trial.

Levine now appeals claiming (1) that evidence of prior legal problems involving the Securities and Exchange Commission (SEC) and financial records showing Levine's "lavish personal expenditures" were improperly admitted; (2) that the trial court should have submitted the issue of financial loss to the jury by special verdict; (3) that the trial court improperly responded to a jury question posed during deliberations; (4) that the evidence was insufficient to support his conviction on aiding and abetting unauthorized access to protected computers; and (5) that notice was required under Federal Rule of Criminal Procedure 32(h) before the district court could depart from Levine's properly calculated advisory Guideline sentencing range.

I. BACKGROUND

A federal grand jury indicted Levine for the counts recited above based on activity conducted at Snipermail.com, Inc., a corporation Levine controlled. Snipermail provided its customers with personal e-mail addresses of individuals who had expressed interest in that customer's line of business. In the course of Snipermail's business, it earned a sub-contract from entities working for "Company No. 1," which in turn was a customer of Acxiom Corporation, one of the world's largest repositories for personal, financial, and corporate data.

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[1] The Honorable William R. Wilson, United States District Judge for the Eastern District of Arkansas.

The relationship between Snipermail, Acxiom, and Company No. 1 allowed Snipermail to access Acxiom's "FTP" server, which is a method of communication used to send and receive files, spreadsheets, and other documents through the Internet. The indictment charged that, while Snipermail's relationship with Company No. 1 allowed access to some files on Acxiom's FTP server, Levine and other employees of Snipermail found a way to access files which they were not authorized to access and downloaded those files. To grant themselves greater access to unauthorized files, Levine and his employees deciphered encrypted password files belonging to Acxiom. When Acxiom noticed the downloads and the criminal investigation began, Levine and his employees sought to alter and conceal computer hard drives in an attempt to thwart the investigation, resulting in an obstruction of justice charge.

II. DISCUSSION

Levine raises five issues on appeal, each of which is explained in its factual context and discussed below.

A. Admission of Prior SEC Trouble and Financial Records

Levine challenges two of the trial court's decisions – one allowing witnesses to testify that Levine "had a problem with the SEC" and the other admitting financial records showing Levine's personal expenditures. Levine argues that the evidence was irrelevant and unduly prejudicial, and thus inadmissible under Federal Rule of Evidence 403.

Challenges to a district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Johnson,*

463 F.3d 803, 808 (8th Cir. 2006). We will only reverse if the error rises beyond the level of harmless error. *Id.* Further, we are not bound by the grounds on which the district court admitted the evidence, as "[i]t is a well-settled principle that we may affirm a district court's judgment on any basis supported by the record." *United States v. Pierson,* 219 F.3d 803, 807 (8th Cir. 2000).

Rule 403 notes that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. However, Rule 403 "does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis." *Wade v. Haynes,* 663 F.2d 778, 783 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade,* 461 U.S. 30 (1983).

Regarding the prior SEC trouble, the government sought to introduce evidence that Levine had a civil sanction entered against him for violation of securities laws, requiring Levine to list Mike Castro, rather than himself, as President of Snipermail. Specifically, the government argued that the structure of Snipermail was relevant both to show Levine's pattern and practice of fraud as well as showing the true structure of the company to support the conspiracy charge against Levine and to refute Levine's defense that his employees conspired to frame him for the conduct charged. Levine suggested that the prior SEC dealing was dissimilar to the current charges, and that it was uncontested that he, rather than Castro, actually controlled the company, making the

evidence inadmissible under Federal Rules of Evidence 403 and 404. However, during opening statements, after explaining the personnel structure of Snipermail, Levine's counsel suggested that the company's personnel "expanded because Mr. Levine had two left thumbs or two left feet . . . when it came to computers" and "that Mr. Levine had to have somebody else send his e-mails."

The trial court characterized the remarks during opening statement as "assert[ing] that Defendant put others out front for innocent reasons." The district court then ruled that the evidence was not admissible under Rule 404(b), but rather was admissible as an admission under Fed. R. Evid. 801(d) – "Statements which are not hearsay." The court, however, strictly limited the evidence to only mentioning that Levine "had a problem with the SEC."

Because the basis of Levine's objection to the admission of the evidence was relevance rather than hearsay, the court's ruling as to the evidence's admissibility under a hearsay rule does not answer Levine's objection. However, having reviewed the record, we find that the admitted evidence was relevant and did not unfairly prejudice Levine under Rule 403.[2]

Levine opened the door to this evidence during opening statement by offering, as the district court found, an "innocent reason" for the structure of Snipermail. Further,

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[2] Levine's objection at trial was largely based on improper character evidence under Rule 404(b). However, the trial court only admitted the statement that Levine "had a problem with the SEC." Levine now appears to argue that this evidence's probative value outweighed its prejudicial effect, that is, that he "had a problem with the SEC" is inadmissible under Rule 403.

Levine's defense, in part, suggested that other employees of Snipermail engaged in a conspiracy to frame Levine for the charged crimes. Both the charged conspiracy and Levine's theory of defense involved conspiracies within Snipermail, making the structure of the organization relevant. Given that the information had relevance, and that the trial court severely limited the information regarding the prior adjudication that could be admitted, we cannot say that it was an abuse of discretion to allow witnesses to testify that Levine "had a problem with the SEC," particularly when the district court found that Levine suggested a different reason for the corporate structure in his opening statement.

As to the financial records, the government sought to introduce corporate credit cards, corporate bank accounts, and two checking accounts of the Levine Family Partnership, a part owner of Snipermail, to prove that Levine benefitted financially from the stealing of Acxiom data. Levine objected on the ground that the unfair prejudice of the records outweighed any probative value, given that it was not contested that Levine controlled Snipermail and made a salary of over $600,000 per year. After hearing argument, the trial court received the documents as evidence.

The trial court noted that Levine's conspiracy "theory of defense makes this evidence admissible." This defense involved submitting evidence of the finances and salaries of other employees of Snipermail, as well as the lifestyle of at least one of their spouses – specifically, that she drove a luxury car.

In light of Levine's chosen defense of airing the finances and lifestyles of his employees, we cannot say

that it was an abuse of discretion for the trial judge to find that the relevance of Levine's own finances and lifestyle outweighed any unfair prejudice. Aside from Levine's defense, the evidence was also relevant to the government's theory that Levine's Snipermail business was failing financially and that the data taken from Acxiom had economic value, providing Levine a motive for the crime.

Given that under "Rule 403[] the general rule is that the balance should be struck in favor of admission," *United States v. Dennis,* 625 F.2d 782, 797 (8th Cir. 1980), and that we "must give great deference to the trial judge who saw and heard the evidence," *id.* at 796, we cannot say that the trial court abused its discretion in admitting either the limited mention of prior SEC problems or the financial records.

B. Determination of Loss

Levine requested that the trial court submit a special jury verdict form to allow the jury to determine the amount of loss stemming from each count charged in the indictment. The government objected and the district court denied the request. It appears that Levine argues that the trial court erred both by not submitting the issue to a jury and by finding the loss equaled $850,000.

In reviewing sentencing decisions, "we review the district court's application of the Guidelines de novo to ensure the proper determination of a Guidelines Sentence." *United States v. Ameri,* 412 F.3d 893, 899 (8th Cir. 2005), *cert. denied,* 126 S.Ct. 1415 (2006). When reviewing a district court's factual findings underlying Guidelines

determinations, we will reverse only if the court clearly erred. *Id.*

Levine argues that the district court erred in making the loss determination by itself, rather than by submitting the issue to the jury. The finding that the loss equaled $850,000 was not a fine imposed upon Levine, but rather was part of the trial court's calculation of Levine's advisory Guideline sentencing range. Specifically, the amount of loss caused by Levine's relevant conduct was a specific offense characteristic under U.S.S.G. §2B1.1(b)(1). We have previously recognized that submitting the matter of loss to a jury is unnecessary. *See United States v. Washburn,* 444 F.3d 1007, 1014 (8th Cir. 2006) (affirming the trial court's decision to exceed the jury's loss finding because "the jury's finding was mere surplusage, as there was no need to submit the matter of the loss amount to the jury"). We hold that the district court properly denied Levine's motion for a special verdict form on loss amount, following our precedent in *Washburn.*

Though less clear, Levine also seems to argue that the court's finding of fact that the loss amount equaled $850,000 was incorrect because "the Court punished Mr. Levine for crimes that were not specifically pled in the indictment." We review findings of fact for clear error. *Ameri,* 412 F.3d at 899.

Various amounts of loss were suggested to the court. The pre-sentence report calculated the loss amount as $58,236,781.64. The government contended that Levine was responsible for $6,798,721 in loss. Levine contended alternatively that the actual or intended loss was zero, or that 95% of the stolen e-mail addresses could be purchased for under $5,000, or that a similar criminal case involving

stolen Acxiom files could be used, where the value of each file was found to be $170 per file, which, when multiplied by the number of files Levine was convicted of stealing, would equal a loss of approximately $30,000. Multiplying the $170 figure by the number of indicted charges, the loss equaled $893,000, which Levine submitted "represent[ed] the absolute highest [amount] that a reasonable person" could find as the value of the stolen files.

Given that Levine's counsel conceded that a reasonable person could arrive at a loss amount of $893,000, we cannot say that the district court clearly erred by setting the loss amount at $850,000. As this court has noted before, the commentary to U.S.S.G. § 2B1.1(b)(1) requires us to give the district court "particular deference on the issue of loss calculation [ ]," placing a "heavy burden" on the defendant, which Levine has not met. *Ameri,* 412 F.3d at 901.

We thus affirm both the district court's decision not to submit the issue of loss calculation to the jury and the court's decision regarding the amount of loss.

C. Response to Jury Question During Deliberation

Levine challenges a response given by the court to a jury question posed during deliberation.

At trial, evidence was presented that Levine owned a laptop computer which contained both personal files as well as files relating to Snipermail sales. The laptop subsequently crashed, requiring Levine and other Snipermail employees to send the hard drive to a professional data recovery company. Once recovered, the data was

returned to Snipermail on compact discs. The government introduced testimony that Snipermail sales data recovered from the crashed computer was not on Levine's laptop that was surrendered to law enforcement. Additionally, the same witness testified that a program that deletes files in a manner making them difficult to recover was operated on the morning that Levine turned the laptop over to law enforcement.

During deliberation, the jury struggled with Instruction No. 22 and Count 144, the instruction and charge on obstruction of justice. The jury asked "[d]o we follow the letter of the indictment when it refers to Instruction 22?" In an attempt to better understand the jury's question, the trial court asked for clarification and received the following question from the jury: "Are the deletion of files from the laptop being considered in [the obstruction of justice count]?" After extended argument from the parties, during which Levine's counsel conceded that the deletion of the files relating to Acxiom could be considered in relation to Count 144, the court responded "Yes" to the jury's question. Levine claims that this response "permitted the jury to convict Mr. Levine for erasing any file even if it did not relate to Acxiom in any fashion."

In reviewing a trial court's response to a jury's question, we leave the response "within the sound discretion of the district court." *United States v. Morrison,* 332 F.3d 530, 532 (8th Cir. 2003) (quotation omitted). However, the "trial court must take great care to insure that any supplemental instructions are accurate, clear, neutral, and nonprejudicial," answering "with concrete accuracy, and within the specific limits of the question presented." *Id.* (quotation omitted).

Levine contends that because the court's answer was simply "Yes" rather than "[Y]es, if it pertains to Acxiom directly or indirectly," as Levine's counsel preferred, the jury might have convicted Levine on the deletion of personal files. This argument fails. The court's "Yes" answer is not to be viewed in isolation. As this court has noted, "[w]ell settled is the rule that jury instructions must be read as a whole." *Ryther v. KARE 11,* 108 F.3d 832, 846 (8th Cir. 1997) (en banc). On review we "presume[] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin,* 471 U.S. 307, 324 n.9 (1985). In this case, the court reminded the jury that "*all* [instructions] are important." Further, the court instructed the jury that to convict Levine for obstruction of justice they must find that "the defendant corruptly concealed hard drives or attempted to do so" and that "the defendant did so with the intent to impair the hard drives' integrity or availability for use in an official proceeding," and that they must be convinced of these two elements beyond a reasonable doubt.

Presuming, as we must, that the jury followed the court's instructions taken as a whole, and in light of Mr. Levine's admission that deletion of files relating to Acxiom could properly be considered as obstruction of justice under Count 144 of the indictment, we cannot say that the district court abused its discretion by answering "Yes" to the jury's question during deliberation.

D. Denial of Motion for Acquittal and Sufficiency of the Evidence

After the jury returned its verdict, Levine filed a motion for judgment of acquittal, arguing, in part, that "there is insufficient evidence as a matter of law to sustain the jury's verdict" on the unauthorized access of a protected computer counts. The district court denied this motion. Levine now appeals, arguing that the evidence for counts 20 through 54 and 56 through 140 was insufficient.

When the defendant claims insufficient evidence, we review the district court's denial of a motion for judgment of acquittal by employing "a strict standard of review . . . viewing the evidence in the light most favorable to the guilty verdict, resolving all evidentiary conflicts in favor of the government, and accepting all reasonable inferences supported by the evidence." *United States v. No Neck,* 472 F.3d 1048, 1052 (8th Cir. 2007). Further, "[w]e will not lightly overturn the jury's verdict and will reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

Here, the grand jury indicted Levine in counts 20 through 140 of intentionally accessing a computer without authorization by means of interstate communication for a commercial or personal advantage valued at over $5000. In his motion for judgment of acquittal, Levine argued that each count related to a specific file and that the government failed to offer direct proof that Levine himself downloaded the files. We note, however, that the government need not prove its case by direct evidence. *See, e.g., United States v. Frokjer,* 415 F.3d 865, 869 (8th Cir. 2005) (noting that circumstantial evidence is sufficient for conviction).

The evidence in this case is voluminous. Having reviewed that evidence, we cannot say that "no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *No Neck,* 472 F.3d at 1052. Employees of Snipermail testified that Levine was instructed on how to use a password to access the Acxiom server, that he had the master password file for Acxiom, and that he received assistance in decoding encrypted passwords on that file. The jury also heard evidence regarding the financial struggles of Snipermail, giving Levine a motive to commit the charged conduct. Further, the jury heard evidence that one employee, Bill Clinton, admitted to using his computer to download improper data and that Levine often worked at Clinton's computer.

Though Levine claims that the lack of an eye-witness requires reversal of his conviction, in light of this evidence we disagree, and affirm the district court's denial of Levine's motion for judgment of acquittal.

E. Propriety of 96-Month Sentence

Finally, Levine appeals his sentence, arguing that the district court "departed" from the Guidelines without giving the parties notice, as required by Federal Rule of Criminal Procedure 32(h). Levine also contests the reasonableness of the 96-month sentence imposed. We review conclusions of law, such as entitlement to notice, de novo. *United States v. Long Soldier,* 431 F.3d 1120, 1122 (8th Cir. 2005).[3] We review the actual sentence imposed for abuse of

[3] Levine's notice argument is most likely subject to plain error review, given that we can find no objection to the lack of notice made at sentencing. *See, e.g., United States v. Ruff,* 472 F.3d 1044, 1047-48 (8th

(Continued on following page)

discretion. *Id.* at 1123. An abuse of discretion occurs when the "sentencing court . . . fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." *Id.* (citing *United States v. Haack,* 403 F.3d 997, 1004 (8th Cir.), *cert. denied,* 126 S.Ct. 276 (2005)).

Federal Rule of Criminal Procedure 32(h) requires that a court give notice to the parties before it departs from the applicable Guidelines range on a basis not identified in either the pre-sentence report or the parties pre-hearing submissions. Fed. R. Crim. P. 32(h). This rule, added by amendment in 2002, has not been amended since *United States v. Booker,* 543 U.S. 220 (2005), which made the Guidelines advisory.

As to the notice required by Rule 32(h), such notice "is not required when the adjustment to the sentence is effected by a variance, rather than by a departure." *Long Soldier,* 431 F.3d at 1122. Here, the trial court announced its Guideline calculations, to which neither party objected, other than Levine advising the court that the Guidelines were only advisory. The court then announced Levine's sentence of "60 months on Counts 20 through 54 and 56 through 140, [and] 96 months on Counts 142, 143, and 144, to run concurrently, for a total of 96 months." The

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Cir. 2007). In fact, Levine's counsel encouraged the court to sentence below the advisory range, noting that "since [the Guidelines are] no longer mandatory, it would not require a formal departure." However, because the government did not raise the lack of objection and because the result under either standard is the same, we give Levine the benefit of the doubt and review de novo.

court then said "This is a nonguideline sentence. It's a variance sentence. I took the steps established in *U.S. v. Sitting Bear.*"

The court correctly termed its sentence as a variance rather than a departure. *See United States v. Sitting Bear,* 436 F.3d 929, 932 (8th Cir. 2006) (noting that Sitting Bear's sentence "was a non-Guidelines sentence, a variance if you will, based upon the district court's review of the case and Sitting Bear's history in light of all of the § 3553(a) sentencing factors."). The sentencing court in Levine's case considered various factors, including the prior SEC adjudication, the factors in 18 U.S.C. § 3553(a), and Levine's character witness and letters. Thus, the court's proper consideration of these factors and the facts of the case, its indication that it was following *Sitting Bear* (itself a variance case), and the court's announcement that the sentence was actually a variance all confirm that under the rule of *Long Soldier,* Levine was not entitled to notice under Rule 32(h).

Reviewing the reasonableness of the 96-months' incarceration imposed, we cannot say that the court abused its discretion. Levine primarily argues that he received an unreasonable upward departure for criminal history. However, as established above, no departure was given.

In varying up from the advisory Guideline level of 26 and a criminal history category of I, corresponding to an advisory range of 63 to 78 months' imprisonment, the court focused on the fact that in his prior SEC trouble "Mr. Levine blatantly and inexcusably violated the securities law by a scheme." Further, the pre-sentence report did not calculate this securities law violation into Levine's

criminal history. Section 3553(a) states that the sentencing court "shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Because the district court gave weight to a factor specifically identified in 18 U.S.C. § 3553(a) as a factor that the court "shall consider," we cannot say that the court abused its discretion in doing so. Accordingly, the 96-month sentence was reasonable.

III. CONCLUSION

For the reasons above, we affirm Levine's conviction and sentence.